Stewart H. Foreman (CSB #61149)
Daniel T. Bernhard (CSB #104229)
FREELAND COOPER & FOREMAN LLP
150 Spear Street, Suite 1800
San Francisco, California 94105
Telephone: (415) 541-0200
Facsimile: (415) 495-4332
Email: foreman@freelandlaw.com
bernhard@freelandlaw.com

Attorneys for Defendants
Todd Dunning and Dunning Enterprise, Inc.

FREELAND COOPER & FOREMAN LLP
150 Spear Street, Suite 1800
San Francisco, California 94105

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY, INC.,

Plaintiff,

v.

DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and DOES 1-20,

Defendants.

CASE NO.: CV-08-4052 JF

NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. PROC. 12(b) BY DEFENDANTS TODD DUNNING AND DUNNING ENTERPRISE, INC.

Date: December 12, 2008
Time: 9:00 a.m.
Place: Courtroom 3, 5th Floor
280 South First Street
San Jose, CA 95113

TO THE PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that on December 12, 2008, at 9:00 a.m. before The Honorable Jeremy Fogel in Courtroom Number 3, 5th Floor, Federal Court House located at 280 South First Street, San Jose, California 95113, defendants Todd Dunning and Dunning Enterprise, Inc. will and hereby do move the Court for an order dismissing the First Amended Complaint filed by plaintiff eBay, Inc. pursuant to Federal Rule of Civil Procedure 12(b)(1), (3) and (6).

Dockets.Justia.com

This Motion is based on the following: (1) there is no federal question on which to base jurisdiction in this Court; (2) the First Amended Complaint fails to state any claim on which relief can be granted by this Court; (3) venue in this Court is improper under 28 U.S.C. Section 1391; and (4) the First Amended Complaint makes claims that are substantially identical to those made in a pending action filed by eBay's agent, Commission Junction, Inc., against these defendants in the Superior Court of the State of California, County of Orange.

This Motion is based upon this Notice and Motion, the attached Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, and the Declaration of Stewart H. Foreman In Support thereof. Defendants Todd Dunning and Dunning Enterprise, Inc. request that this Court grant their Motion to Dismiss the First Amended Complaint.

Dated: October 27, 2008

FREELAND COOPER & FOREMAN LLP

By: ________________/s/______________
STEWART H. FOREMAN
Attorneys for Defendants
Todd Dunning and Dunning Enterprise

FREELAND COOPER & FOREMAN LLP
150 Spear Street, Suite 1800
San Francisco, California 94105